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As we look out over the heterogeneous materials of a law library of any pretensions, at first sight there is a mass of obsolete or obsolescent statutes, of forgotten, almost unreadable black letter folios, of text books in crumbling law calf bindings covered with dust, all of which in their time made part of the state of the law at some given date, in some given place. Yet when we examine that mass of material more closely, there seems to emerge out of it a universal, permanent, enduring element which is in very truth irrepealable. If we look only at the present, we seem to find something that gives form and consistency to the legislation which pours forth biennially or even annually from the lawmaking bodies of forty-eight states. We seem to find something which gives consistency and unity to the mass of decisions coming forth from forty-eight Supreme Courts, each with full authority to declare the common law, from the Federal Supreme Court, and nine Circuit Courts of Appeal, and from the courts of England and Ireland and Canada and Australia. Even more, as we look back over the legal history of English-speaking peoples, we seem to be conscious of something which binds the law of our time and place, not merely to the law of Blackstone's time, not merely to the classical common law of the time of Lord Coke, but even to medieval English law—to the law of thirteenth-century England. Indeed, there are at least two states today which print Magna Charta in the forefront of their statute books as presumably a part of their living law.

If we give to this permanent, this enduring element, the name of the common law, or its medieval name of the law of the land, I suppose there is no phenomenon of our legal or social history which is so marked as the persistence and the vitality of this law of the land. It has come into competition with the great rival tradition of the modern world many times and in many places, and has never taken a backward step. Only historians know that the Custom of Paris once obtained in Michigan, Wisconsin and Illinois. The map contains many reminders that the territory of those states was once politically French. But there is not an item in their law today to suggest that historical fact. The Spanish-Roman law was once in force in Florida, and architectural remains of the Spanish regime are still to be seen. But there is not a mark upon the law of Florida today to indicate that it was ever other than a common-law jurisdiction. With the one exception of Louisiana, the great commonwealths which were carved out

of the Louisiana purchase are common-law jurisdictions without a mark upon their law to suggest that the French Roman law once obtained over that domain. Even in Louisiana itself, which is governed in form by a Civil Code translated almost word for word from the Civil Code of France, the whole technique of judicial precedents, the whole apparatus of finding the grounds of decision in recorded judicial experience, has become that of the common law. Except for the terminology of certain subjects, except for family law, the law of inheritance, and some parts of the law of property, the basis of the law in that jurisdiction has become substantially the common law. Even more, wherever in the modern world the jurisdiction of the Judicial Committee of the Privy Council extends over countries which had inherited the civil law, more and more we find that their legal materials are making over by our common law technique of precedents and judicial action on the basis of reported decisions, and are ceasing to be Roman Law in anything but terminology. Moreover, Scotland, which received the Roman Law in the sixteenth century, has become more truly a common-law than a civil-law jurisdiction. If you leave out the Scotch Romanized terminology, you will find that somehow or other, on points of divergence, the English technique and the English doctrines have prevailed over the methods and doctrines of Justinian's Digest.

Nor has the law of the land shown less of persistence and vitality in competition with other political and social forces. In the twelfth century it came into conflict with the church, the most powerful force in medieval society, and by the so-called compromise, which gave to the King's courts all that was worth while in the way of jurisdiction over controversies between man and man, it emerged definitely the victor. In the sixteenth century when the reception of Roman law was going on throughout Western Europe, the common law stood steadfast, and England alone of the great nations of that era of rising nationality did not replace the law of the land by the Roman law. In the seventeenth century the common law doctrine of the supremacy of law came into conflict with Stuart kings in a period of absolute government, in a time when passive obedience was the ruling political dogma. A long and bitter struggle went on between common-law courts and the Crown, and in the end the common law was able to impose upon the Crown its doctrine that the King rules under God and the law. In America, at the beginning of the nineteenth century the law of the land was confronted by the rising tide of Jeffersonian democracy. It was sore beset to overcome the odium of its English origin at a time when all things English were under suspicion and men were turning with favor to things

French. Its ideas as to the obligation of contract were distasteful to debtors in an era of economic depression. Its doctrine of the supremacy of the law, and consequent judicial power under a written constitution, was distasteful to those who looked on the legislature as preeminently representative of the popular will, and conceived that judicial scrutiny of the translation of popular impulse into chapter and section of the written law was nothing short of usurpation. Yet the legal triumph of the common law was no less complete than the political triumph of democracy. Finally, at the beginning of the present century, the common law came in conflict with the rising tide of social legislation, and once more encountered the strongest force of the time. Agitation for recall of judges and of judicial decision threatened the very foundations of the law of the land, the independence of the judiciary and the supremacy of law. Yet at the end of two decades that agitation had subsided and the law of the land had imposed upon a sovereign people its doctrine that they, too, ruled under God and the law.

Yet when we come to ask ourselves just what this law of the land really is, just what it is that makes the law of forty-eight states in the Union in essence one system, just what it is that makes American law one with the law of England and Canada and Australia, just what it is that gives continuity to the law of English-speaking peoples today and the law of medieval England —when we ask this question and seek to answer it critically, I venture to think we shall find it hard to put our finger upon anything definite.

Certainly we cannot maintain that there is an identity or continuity of legal precepts. One need only pick up a volume of Canadian reports or Australian reports or English reports or reports of different states of this Union in order to see that the actual precepts by which justice is administered differ notably as you go from place to place. Diversity of geographical conditions, diversity of economic conditions, diversity of social conditions lead to palpable diversities in the legal precepts which actually obtain in the different jurisdictions of the English-speaking world. Moreover, when we look back over our legal history, we cannot but be struck with the relatively short life of rules of law, that is of legal precepts affixing definite detailed consequences to definite detailed states of fact.

Not long since I had occasion to make a somewhat critical study of one hundred and fifty years of American judicial decision, from the Declaration of Rights of the Continental Congress in 1774 to 1924. I soon found that I could not put my finger upon much of anything in the reports of 1774 and say

with honest conviction, "Here is a rule which actually obtains in practice in the adjudication of causes in contemporary America." What do we find in the books of that time? They are full of minutiae of procedure upon imprisonment for debt. They are full of technical details about the settlement of paupers. They are full of technical details of real actions and of the old feudal land law, which was already dead in large part when it was imported to this country, and has had to be made over perhaps more than once. They are full of the technicalities of the formal over-refined procedure of the eighteenth century English law. What were the first books that came out of American law schools? The first effort of American legal writing in law schools was a treatise on the law of Baron and Feme, the title of which speaks for itself. The second in point of time was a treatise on real actions. Outside of New England that title hardly evokes a memory in an audience of lawyers. Except as the writ of entry survives in New England, it may be that an occasional older lawyer may have read about real actions when he read Blackstone in his youth. But I dare say he skipped that part and turned to parts that had some relevance to the matters of the day.

Clearly we cannot find unity of law in English-speaking lands and continuity of law, even from Blackstone's day to the present, in any identity or continuity of legal precepts. Perhaps, then, we are to find this unity and this continuity in certain principles. It may be that there are certain fundamental, universal principles which are to be found wherever English law has followed English speech. It may be that this small fund of common principles ties us to the Middle Ages and ties us to the law of England and Canada and Australia. I would like to think that this is true. And yet when we come to search for those principles, we shall find them very elusive. Beyond a few fundamental ideas of justice, which are common to civilized peoples, a small body of axioms of justice which we share with the civil law, one finds it very hard to put his finger upon a proposition and say, "Here is an essential, characteristic, common-law principle, which has obtained from the Middle Ages to the present, and obtains wherever the English law obtains." We may trace the beginning of principles; we may see their rise and their fall. If we look into the axioms of Doctor and Student, we shall not find one that is of importance in the administration of justice today. If we look at the principles laid down in Coke or Littleton as the foundations of legal reasoning they make us smile today, so scholastic, so pedantic, so unrelated to what we think of as the realities of justice do they appear. We cannot, I undertake to say, put a

finger with confidence on any proposition and say, "Here is a principle that binds us to the great English judges of the Middle Ages—to Choke and Bryan and Fortescue—that binds the law of the Dakotas to the law of England and Canada and Australia."

Let me illustrate. Take such a supposedly fundamental proposition as the one by which we set so much store in the last generation, namely, that there was to be no liability without fault or undertaking; that a man's liability was to flow from intentional aggression, or from culpable conduct, or from voluntary undertaking, and from these only. As late as the seventeenth century this was not true of trespass upon the person. It has never been true as to trespassing animals. It has not been true in England since 1865 with respect to things of potential danger which one maintains rightfully upon his land. It ceased to be true as to blasting operations in New York a good while ago when such operations came into common use in connection with the building trades. We can trace its beginning in the books. Likewise we can trace the growth of doubts and qualifications and explanations and exceptions which suggest that it may yet have an end.

But there is another possibility. If this law of the land or common law, of which we speak so confidently, is not a body of precepts, and we cannot be sure that it is a body of principles, in the sense of a body abiding, universal, authoritative premises for legal reasoning, which distinguish our law from the law of the Continent of Europe and its derivatives, perhaps the universal and characteristic element of which we are in search is to be found in certain institutions. It may be that there are certain peculiar common-law institutions which mark off Anglo-American law from the civil law, and which are to be found wherever the English law prevails. If there are such universal and characteristic institutions, I suppose all would agree in pointing to three: The doctrine of precedents, the doctrine of supremacy of law, and trial by jury.

Certainly such a hypothesis is attractive. Yet the doctrine of precedents has been relaxing within the memory of those now at the bar. Whatever our theory, our practice by no means gives controlling weight to a single decision, as the lists of overruled cases in every jurisdiction abundantly witness. And while we are relaxing our doctrine, something very like it is growing up in Continental Europe. Whatever the theory of the Civilians, in practice, as recent French writers admit, the course of decision of the courts has come to be a form of the law. Nor is it more clear when we look critically at the doctrine of supremacy of law. This doctrine has been regarded as characteristically Anglo-Amer-

ican. But it has been carried much further in this country than in any other English-speaking land, in our doctrine of judicial power with respect to unconstitutional legislation, and that doctrine has been worked out by courts in South Africa on the basis of Roman Dutch and civil law authorities. Moreover, we are developing something very like administrative law in England and in the United States, while at the same time, when we look at the administrative tribunals of France, for example, we soon find that, whatever they are in name, in spirit and in conduct they are ordinary courts. Thus Dicey's confident distinctions at least lose their edge, and we cannot be so positive that we have here a peculiar common-law institution.

As to trial by jury, the civil jury is almost extinct in England, and there are signs that it is moribund in this country. Even the criminal jury is under attack, and legislation modifying it, in directions which may yet lead to extinction, is urged in more than one state. The one feature upon which, perhaps, we may put our finger with confidence, as an abiding universal common-law institution, is that mode of trial of cases as a whole which has grown out of the exigencies of jury trial. As to that, we must remember that such was the Roman mode of trial. Nor should we overlook that the exigencies of causes involving expert evidence have been pushing us in more than one instance in the direction of inquisitorial rather than controversial procedure.

Moreover, if we have some residium of permanent, universal, characteristic common-law institutions we must note that today they are under attack from every side. For one thing there is legislation. You may say that the danger from legislation is not great. It deals with transient details, not with enduring principles. The common law gives a background to legislation which moulds legislation to its dogmas. Legislation is interpreted by common-law canons and is given shape by the received ideas of a profession trained in the common law. Moreover, if you look into legislation it does not always seem to carry with it a danger to the common law. I like to think of a statute by which it was enacted that "It shall be unlawful for any person or persons to discharge any loaded firearm or firearms in, along, or upon any public road or highway in the state, except for the purpose of killing some noxious or dangerous animal or an officer in the pursuit of his duty." No doubt common-law institutions are in no great danger from such legislation. Yet as one studies legislation its corrosive and destructive possibilities cannot but be brought home to him.

Thus, in England today by statute the real property of a deceased passes to his administrator. In Oklahoma today by statute

the personal property of a deceased person passes to his heirs. In other words, we have here two radically different statutory alterations of what had been supposed to be a fundamental common-law dogma. Nor is that an isolated instance. Consider the growing frequency of statutory crimes without mens rea which go counter to the very common-law conception of a crime. Consider the growth of statutory liens of all sorts whereby we are coming to forget the nature of a lien at common law. Consider the continual legislative development of negotiability at the expense of the common law dogma that one can transfer nothing more than he has. Legislation is continually undermining legal precepts, legal dogmas, and legal principles which we had identified with the common law.

But legislation is not all. A much more serious phenomenon is the rise of administrative jurisdiction. Within a generation there has been a wonderful development of administrative justice. I would not decry this development for a moment. No doubt it was inevitable. No doubt administrative justice is called for in increasing measure by the rise of an urban industrial society where we had a rural agricultural society. But let us note its effect upon what we should conventionally think of as common law.

What is the characteristic method of the administrative tribunal as contrasted with the common-law tribunal? Is it not that the former seeks to individualize the treatment of cases, whereas the latter seeks to treat each case as but an example of some type to be referred to some legal principle? Recently I was talking with a physician about this growing tendency to individualize the treatment of controversies. "Why," he said to me, "the same thing is happening in medicine. When I came into the profession we used to treat the lungs, the liver, the heart, the stomach, as if they existed of themselves. We found a man whose symptoms indicated trouble with his lungs, his liver, his heart, or his stomach. Our books told us what to do for the abstract lungs, the abstract liver, the abstract heart, the abstract stomach, and we treated him accordingly. Today," he said "we have learned to deal with John Doe and Richard Doe whose lungs or liver or heart or stomach are not functioning as they should."

Now it is that same tendency, which we find in every field of human activity today, that is bringing us to attempt individualization of legal remedial treatment; that is leading us to proceed by affording guidance to the actual business of the actual man as it must be dealt with in the crowded world of time, if business is to go on, rather than by prescribing abstract formulas for ab-

stract businesses. So I do not for a moment fear anything from this rise of administrative justice in and of itself. And yet let us look at it from the standpoint of the common law.

In his Second Institute, Lord Coke tells us that there can be nothing in the way of oppression between man and man and nothing affecting the life or liberty or fortune of the subject, and no manner of misgovernment, but that it shall be reviewed ultimately in the King's courts and due correction be made. Such was the common-law ideal, and such was the practice of common-law countries from the seventeenth century at least till the beginning of the present century.

But times change. In England the House of Lords now holds that in an administrative appeal from an administrative officer to an administrative appellate tribunal, the ordinary decencies of judicial appellate procedure do not obtain, that the tribunal may act on a secret report of an inspector who makes a secret inspection which the appellant may not see, may not criticize or contradict, and may not explain by independent evidence or extrinsic argument. It now holds that provided the administrative appellate tribunal applies its ordinary procedure and deals with John Doe's case or Richard Doe's as it habitually deals with any one else's, there can be no complaint even though its mode of dealing with the case is that of Haroun al Raschid or of St. Louis under the oak at Vincennes. Where the common law thought of every case as one of a type, so that the decision was to be referred to some principle governing a group or a class of cases, so that it was necessary to hear arguments in order to insure right classification and accurate generalization, administration thinks of each case as unique, or seizes upon its unique features, and deals with it concretely as if no other case like it ever existed or could ever come before the tribunal. In such a view the next case will not be affected by what is done and no argument is needed to insure a correct solution of future controversies.

Well, you will say, that is England, and we all know that queer things have been happening in that ancient Kingdom; that for some time the mother country has been edging toward socialism in legislation, and so why not in judicial decision. But let us look at our own administrative law. In the same year in which the House of Lords was deciding that an administrative appeal might be heard after the manner of Haroun al Raschid, it happened in one of the largest cities of the land that an employee of an ice company came home one evening in a very dilapidated condition. He was shaky, nervous and pale and had no appetite for his supper. When his wife asked him what was the matter

he said that the boys had been putting in ice in the basement of Hogan's saloon and that a three hundred pound block of ice had fallen on him and had shaken him up badly. He got no better. His wife sent for a physician to whom he told the same story. The physician looked him over and sent him to a hospital, where he died the next morning—of delirium tremens. His widow brought in a claim under the Workmen's Compensation Act for the death due to an injury in the course of her husband's employment. In the course of investigation of her claim it appeared that there was no abrasion or mark or bruise upon the body of the deceased. Also from the unanimous testimony of those who had been at work upon the wagon that morning, it appeared that he had spent his time neither upon the ice wagon nor upon the water wagon, but that while the ice was being put into the basement of Hogan's place he was at all times in the interior thereof laying the foundation of the fatal attack which took him off the next morning. But the statute said that, in administering the act, the commission was not to be governed by the technical rules of evidence; and it seemed to the commissioners a highly technical rule of evidence to require proof of any causal connection between the employment on the ice wagon and the fatal result. Likewise when the case came before the highest court in the state that court found itself much embarrassed. The testimony as to what the husband said was before the administrative tribunal as evidence. If the tribunal chose to act on that evidence to the exclusion of the evidence of all who had immediate first-hand knowledge, if it was the regular wont of the tribunal to proceed on such testimony as a basis of award in the face of the manifest evidence, how was the court to interfere? If the commission proceeded not on a general principle of causation, but on a principle of distribution of the economic surplus with reference to the immediate parties to the claim, could the court insist on the judicial rather than the administrative attitude? You will perceive how fundamental common-law ideas are subject to corrosion and destruction in this rise of administrative justice.

But legislation and administration are not alone in this tendency to treat every situation as unique. When we come to study current adjudication we may perceive the same corroding process. The courts of forty-eight states, each with a mouth speaking great things, are competent to lay down the common law and determine what shall be the universal common law for each particular jurisdiction. Hitherto, the art of the common-law lawyer's craft, applied to the authoritative traditional legal materials, kept a reasonable uniformity. Very likely it will continue to do so. But note how the reasonable uniformity may be in the administrative direction. Note, for example, what has been happen-

ing to the fundamentals of agency. At common law, a parent is not responsible for the independent tort of his child. He is not liable unless some agency of the child can be made out; unless the child was acting on the concerns of the parent and within the scope thereof, or unless the parent himself was in some way at fault. But these propositions have been much shaken of late by the rise of the judicial doctrine of the family automobile. If little Willie took out the family horse and buggy he could not do much in the way of damage to any one but his father. So the courts asked: Was he an agent? Was his father culpable in allowing him to be at large with the horse and buggy? Or was Willie out unknown to his parents on a frolic of his own? But the automobile is such a dangerous instrument, and its possession seems to indicate such affluence on the part of the parent, that regard for an equitable distribution of the economic surplus as between the parties to a particular cause, has called for invention of the judicial doctrine of the family automobile. It has been suggested that the principle behind that doctrine is *qui facit per auto facit per se.*

But enough of examples. I submit that in legislation, in administration, and even in judicial decision, we may see a steady wearing away of what we had regarded as common-law principles, of what we had taken to be fundamental common-law doctrines and dogmas. Now I do not fear this process. I do not believe that it portends any evil, I do not believe that it is a symptom of decay, legal or moral or political. Legal history is full of such things. There are eras of legal stability and there are eras of legal growth. When for a time the rise of new interests or new conflicts of interests call for new adjustments, we revert for a season to a process of trial and error until we learn how to do things better. In that process of trial and error there is always bound to be not a little of error.

Shall we say, then, that there is no common law except in historical retrospect? Shall we say there is no irreversable, irrepealable, enduring element in American law? Shall we say there is but a mere illusion of continuity in our legal history, with nothing but a common historical origin behind us and the Courts of Westminster? Shall we say that nothing but a certain common historical terminology holds together the law of England, of the United States, of Canada and of Australia?

They tell a story of the great Bishop Wilberforce, that when he became Bishop he made a resolution that he would visit every parish in his diocese, and thus would keep up its spiritual life. Accordingly, in due course, he went into one remote parish where there was a fine old fox-hunting parson who was wont to go

through the morning service pretty rapidly and then get on his horse and go about his more immediate pursuits. The Bishop was much shocked. He said to the parson: "This won't do. We must have some spiritual life in this parish." "Well," said the parson, "I thought so, too, when I came here forty years ago. But forty years in this parish tend to disabuse one of such ideas." "Oh," said the Bishop, "that won't do. I will show you what you should do. I will come down here next Sunday and preach and set you an example." So the next Sunday the Bishop came and preached as only he could on the text, "The fool hath said in his heart there is no God." After the service the parson said, "Now we shall see what the parish makes of the sermon." So he sent for Hodge, an honest old farmer, to come up and be presented to the Lord Bishop. Hodge came twisting his cap in his hand and very much embarrassed, and was duly presented. "Now, Hodge," said the parson, "tell the Lord Bishop what you thought of the sermon." "Oh, my Lord," said Hodge, "it were a powerful sermon; it were indeed a powerful sermon. But, my Lord, I cannot help thinking there do be a God after all."

After all the doubts I have expressed as to the hypothesis of a universal, enduring continuous common law, I still feel that there "do be" a common law after all, and I shall venture to suggest to you where I think it may be found. For I submit that our trouble comes at bottom from a certain ambiguity in the term "law." It comes from our thinking of law as something simple. It comes from our thinking of law as merely an aggregate of laws and from thinking of laws as rules—as simply definite precepts attaching definite detailed legal consequences to definite detailed states of fact. Undoubtedly such rules—for example, the Rule in Shelley's Case, the statutory rules as to the number of witnesses required for a will, the rule as to what words are words of negotiability, and as to the effect of such words—such rules are a very important element in the law. Some of them are traditional. Some of them are statutory. But such rules are not all even of the body of legal precepts of which we commonly think when we speak of the law. Along with such rules there are principles, authoritative starting points for legal reasoning, such as the principle that one person is not to be enriched unjustly at the expense of another, or that one who does something which on its face is injurious to another must answer for the consequences unless he can justify. Here no definite detailed legal results are prescribed for any definite detailed state of facts. There are no rules. There are instead premises from which to deduce rules. Then, too, there are other precepts which enjoin conformity to certain standards, like the standard of due care which we apply to all

conduct, or the standard of fair conduct which we apply to fiduciaries, or the standard of reasonable facilities and reasonable rates and reasonable service which we apply to public utilities. It will be seen that even the element of legal precepts is far from simple.

Over and above the mass of legal precepts, however, there are other elements which are no less a part of the authoritative apparatus with which justice is administered every day in the courts. One of those elements is a traditional technique of finding the grounds of decision in the mass of precepts both statutory and traditional; a technique of developing the grounds of decision of particular cases out of the authoritative materials; a technique of shaping precepts to meet new situations, of developing principles to meet new cases, and of working out from our whole body of legal materials the precepts appropriate to the concrete situation here and now. This element is, as it were, the art of the common-law lawyer's craft.

Another element in the law is a body of received ideals of the social order, and so of the legal order; a body of received ideals of what law is and what law is for, and so of what legal precepts and legal principles ought to be, and how they ought to be applied in the light thereof. These ideals are the background of all judicial action, whether in finding law, in interpreting it, or in applying it. They give content and form to legal precepts and dictate their application. This is the element we have in mind when we speak of law as universal and rooted in the eternal verities. It is this element which the philosophical jurist has in mind when he tells us that law cannot be made but can only be found. With his eye on this element only he thinks of legislation not as creative, but as a mere formulating process. As he sees it, the reality of law is in this ideal element; legislator and judge do no more than give definite formulation to details drawn from this ideal picture of the whole. English and American lawyers have been wont to ignore this element and to look exclusively at the element of legal precepts. But to understand law, to administer justice according to law, and to make law, we must understand all three.

When we look at these three elements which go to make up the law, it is evident that the element of legal precepts is more or less fleeting. By going through the reports at intervals of about fifty years, it can be shown that for practical purposes the whole body of precepts changes in not much more than a generation. I suppose when you think about the law today you are likely to think of contracts and torts as the great subjects. But

if you look in Blackstone for what we call the law of contracts today, you may look a long time and find very little. And as to Torts, the first book upon that subject was written in 1859, and as late as 1874 there were doubts whether there was such a thing as the law of torts. The law which was significant one hundred and fifty years ago, real actions, the technicalities of the feudal land law, the settlement of paupers, imprisonment for debt, the niceties of eighteenth-century common-law practice — well, "Where are the snows of yesteryear?" The law of taxation, the subject which is to the fore in the reports of today, was scarcely heard of a generation ago.

Received ideals, the third element in the law, are not so fleeting. Relatively they have a long life. Though they, too, change, they change slowly. That this element does change may be seen readily when we compare the received ideals of the age of Coke, when lawyers still thought in terms of the relationally organized society of the Middle Ages, with the received ideals of the last generation, influenced profoundly by the classical economics, by the political ideas of the French Revolution, and by the identification of the immemorial common-law rights of Englishmen with the natural rights of man. The controlling part which these received ideals play in judicial decision is made manifest whenever courts are called upon to apply to social legislation the constitutional guarantee of due process of law. That some change may be taking place is suggested by the common phenomenon of five to four decisions in such cases in the Supreme Court of the United States.

But the element which is enduring, the element which gives consistency, unity, and continuity to the law, the element which distinguishes the common law from the civil law, the element which makes us conscious of a real unity of English law and American law and Canadian law and Australian law, is the traditional art of the lawyer's craft, the traditional technique of deciding cases on the basis of recorded judicial experience, of applying legal materials, and shaping them and reshaping them and developing them as the exigencies of the administration of justice require. There is the decisive point of difference between the common law and the civil law.

From Roman times the civilian's technique has been one of interpreting, developing, and applying written texts. To the civilian the form of the law is typically that of a code, ancient or modern. When he is confronted with a case requiring decision, he manipulates the authoritative texts by his traditional technique. His method is one of logical development and logical

exposition of supposedly universal propositions. To him the oracles of the law are academic teachers, the books of authority are codes, and the text books are commentaries upon codes. The whole tradition is one of the logical handling of written texts.

On the other hand, our common-law technique is a technique of developing and applying judicial experience. It is a technique of finding the grounds of decision in the reported cases. It is a technique of shaping and reshaping principles drawn from recorded judicial decisions. The oracles of our law are not teachers but judges. Our books of authority are reports of adjudicated cases. Our text books are treatises on subjects of the law developed through comparison and analysis of recorded judicial experience.

More important, however, as I see it, is the frame of mind that lies behind this traditional technique of the common-law lawyer. It is a frame of mind which looks at things in the concrete, not in the abstract; which puts its faith in experience rather than in abstractions. It is a frame of mind which prefers to go forward cautiously on the basis of experience from this case or that case to the next case, as justice in each case seems to require, instead of trying to refer everything back to supposed universals. It is a frame of mind which is not ambitious to formulate universal propositions and disinclined to deduce the decision for the case in hand from a proposition formulated universally, as like as not by one who had never conceived of the problem by which jurist or tribunal is confronted. In other words, our technique rests on that surefooted Anglo-Saxon habit of dealing with things as they arise in the light of experience, instead of putting one's faith in abstract formulas.

If the spirit of this art of the common-law lawyer's craft is the spirit of the common law, it seems to me our most precious legal possession. It is the duty of the common-law lawyer to preserve this attitude of mind in its full vigor, that it may be handed down as as living instrument of justice among all English-speaking peoples.

PRESIDENT: Dean Pound, we are grateful to you for this message. I don't know how you feel but we think it was worth your trip from Massachusetts out here.

MR. KNAUFF: Some 18 or 19 years ago I attended a meeting of the State Bar Association at which time we listened to Dean Pound, and after the meeting we moved by a rising vote that the Dean be made an HONORARY member of the organization. Since that time we have been incorporated as a Bar

Association under the laws of the State of North Dakota, and it seems to me proper at this time, and I therefore move, that Dean Pound be made an HONORABLE member of the North Dakota Bar Association, and that his address be printed and distributed in our regular report.

PRESIDENT: Do I hear a second?

MEMBER: I second the motion.

PRESIDENT: Gentlemen, you have heard the motion, as many as are in favor of the motion signify by rising. (All rise.)

PRESIDENT: You may be seated.

Any who are opposed.

Dean, I knew there was some cause for your greatness, some cause for your wisdom, now I know what it is, and I presume that it began back in Valley City, eighteen years ago when we had the pleasure of constituting you an honorary member of the law fraternity of this State. Now I have the pleasure and honor of constituting you a member, and this time an honorable member, of the Bar Association of this State.

We will now resume our business. I hope that none of the lawyers will retire as we have the election of officers and other important matters to take up.

We are going to take up for consideration first the report of the Criminal Law Committee. That is the unfinished order of business. We were considering the report of the Criminal Law Committee on a substitute motion. A motion was first made for the adoption of the report, carrying an adoption of the recommendations and then a substitute motion was made, if I recall correctly. If not, I will ask the stenographer to correct me. The substitute motion was made by Mr. Cuthbert and seconded by Mr. Bangs that the report be received and printed and its consideration postponed until the next session of the Bar Association at the next annual meeting. Are there any remarks on the substitute motion?

MR. STUTSMAN: I would like to know what the concrete objections to that report are. I have heard the gentlemen, in general terms, speak about the presumption of guilt, but I did not hear them make any concrete objections to the report. I would be glad to hear what they are. I am in favor of the report.

MR. BANGS: That is in part directed to me, as I am the person who seconded the substitute motion. I am not in position

to say that I have no objection to the report because I only heard it read this morning, rapidly, and I have had no opportunity to consider it. I do not know just what the report is, and I venture to say that, unless Mr. Stutsman has had occasion to see the report he can't get up now and tell the audience what the report is and what the recommendations are. Perhaps he has a memory to carry that through, but some of us haven't. I don't know what the report is, and I don't know what the recommendations are, but I do know that the subject is important and I want to know about it before I vote.

MR. STUTSMAN: I would like to find out and discuss the different recommendations one by one. My recollection is that there are a half dozen recommendations that were made a year ago by this committee that were not incorporated into law, notwithstanding the fact that they were recommended for passage. One refers to capital punishment. That is the way I remember it, and the committee recommends that the Legislature adopt a bill for capital punishment. I am for it. The other recommendations are more or less important and they should be thoroughly discussed and this is the time to do it. I don't see any occasion for passing it over to next year because we did not catch the recommendations.

MR. CUTHBERT: If it is so very important to hang a man, I may withdraw my objection if Mr. Stutsman will tell me whom he has in mind. Outside of that I cannot see the terrible rush that Mr. Stutsman or any other lawyer may have for such drastic legislation, particularly in view of the fact that the Legislature will not meet until after our next annual meeting. Now I respectfully submit to this Bar that the report was never placed in our hands; that we have had no opportunity to study the recommendations embodied therein; and that in many respects it advocates things revolting to our established practice; that it is not necessary for us at this time without study of the recommendations, to pass it, but that it can be allowed to stand until our next meeting; that if we adopt it now people will assume that we are willing to let a man holding the position of Attorney General come here and read a report and then without deliberation adopt that report with the same unhesitancy that they adopt a resolution at some Sunday School picnic. I am going to move again and I hope it will carry, that the report be filed and distributed to the bar and that it be carried over for further discussion and vote to our next meeting.

MR. FEETHAM: Before dinner I was rather anxious to speak on this subject and after consideration I have decided to speak.

For a matter of fifteen years I have not tried a criminal case in District Court. Prior to that I tried a great many and I am able to sit back a little bit further than some of the attorneys who have been talking and arguing, and I look at this matter as a citizen of the United States and not as an attorney. And, Mr. President, though we are a body of attorneys, in my judgment that is the way this matter should be considered. There is no reason for anything heated on the part of Mr. Cuthbert or Mr. Stutsman or Mr. Bangs. We are up against a cold-blooded proposition. A proposition that appeals to all of you as citizens. We are confronted by a condition, not by a theory over this land. The criminal can make a living at the expense of his fellows. He is going over the state robbing our people and robbings banks and committing murder. He is going through the State armed and ready to perform a murder at any time it becomes necessary. We are dealing with the protection of a citizen against banditry organized in Chicago, in Philadelphia and Atlanta; in States further east and preying upon us, and who, according to statements of the Attorney General, have one chance in ten of being caught. Now while I have not been in the active practice so as to try a criminal case in fifteen years, I have been somewhat in touch with the situation and I haven't seen any difficulty in the matter of conviction of criminals after they had been caught. I haven't been able to recall in my mind any case of any professional criminal who was caught and brought before the bar of justice who was not easily and comfortably convicted. Now if my recollection of that matter is true, isn't that part of the report of this committee which seeks to give the prosecuting officers more power than they now have and take from the defendant certain rights, is it right that it should be adopted, is it necessary? That is not our trouble. Our courts are swift; our punishment is regular and there is no necessity of changing the practice. You bring a criminal into this County and let him rob a bank and let us get him with the evidence on him and he will be in the penitentiary inside of six months. There is no reason why we should take from the honest, who may sometimes be charged with a crime, the rights and privileges with which the law, from the day of the Magna Charta, has surrounded him. I am free to say that I have not the greatest faith and confidence in the fairness of prosecuting officers of any County or City. I have seen cases where they took unfair advantage of defendants, and I have seen at least one man railroaded to the penitentiary. I want to say the time has not come to take from the English-speaking people the rights the English-speaking people have had since the day of King John. With reference to that part of the

recommendations, that part should be scrutinized with great care. Prosecuting officers are bound up in the idea of prosecution, and have a one-track mind with reference to prosecution and don't think of the rights of the common people. Who knows but what you or I or any of us here may be standing before the bar of justice fighting for our rights. We desire to be protected by the rights that the English-speaking people have always had. So much for that.

I now pass to the matter of this transient criminal. That is what is threatening us; that is the man from whom we have to guard ourselves. How shall we guard ourselves? State police, in my judgment, would be a satisfactory thing and if added might possibly add one per cent to the number of convictions that would come in. But you are going to find that the men who rob banks are professional criminals with automobiles and they are going to get in and out of the State as fast as they can and as soon as they pass out of the State there is only one chance in ten of being caught. How are we going to keep them out of the State? That is the question that we are interested in. In this State we must pass laws which will put the fear of the law in their hearts and we must pass laws which the juries will carry into effect and we must produce to the Legislature laws which they will pass.

MR. LIBBY: I have not imposed myself upon this Association, but I would like some little time on my report of the Committee on Memorials and I want to warn the brothers that the hour is getting late and I now move the substitute motion.

MEMBER: I second the motion.

PRESIDENT: As many as are in favor of the substitute motion, which is in substance the postponing of this subject till the next general meeting and the acceptance and printing of the report will signify by saying "aye." Those opposed "no." Motion is carried.

MR. MCCURDY: I would like to move that a copy of this report be printed and supplied and sent to each member of the Association, so that this matter may be considered at three o'clock on the first day of the next meeting.

MEMBER: I second the motion.

PRESIDENT: You have heard the motion. It is not necessary to repeat it. Are there any remarks? If not, those in favor will signify by saying "aye." Motion carried. The matter will be referred to the Executive Committee for action.

We will now take the report of the last committee, the Committee on Memorials. Before the chairman makes the report I want to say a word. He and his committee, and as usual he has been the committee, have done a lot of work in preparing suitable resolutions for those of our members who have gone. Mr. Libby, I ask you to give the report of your committee at this time.

MR. LIBBY: Mr. President and gentlemen of the Association: Many subjects of great interest not only to the Bar of the State but to the State at large have come before this meeting. There have been a good many discussions and they have been very interesting to me and many times during the past two days I have felt like talking a little myself but I refrained from it. At a meeting of this character, where so much diversity of opinion exists, where so many subjects are discussed and so many matters are settled for the next year, there is much work to be done and I here now compliment the president, Brother McIntyre, on his fairness, on his dignity and on his patience during the last two days. It is a trying position, but he has handled the situation most beautifully.

I will now submit the report of the Committee on Memorials.

In Memoriam